

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 17, 2001

In Re: *BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*

Docket No. 97-00309

**INITIAL ORDER RESOLVING DISCOVERY DISPUTES AND
SUSPENDING PROCEDURAL SCHEDULE**

This matter came before the Hearing Officer for consideration of the *Motion to Compel of Consumer Advocate and Protection Division of the Office of Attorney General* ("Consumer Advocate's Motion") and the *Motion of AT&T Communications of the South Central States, Inc., Covad Communications, Inc., MCI WorldCom, Inc., the Southeastern Competitive Carriers Association, Time Warner and XO Tennessee, Inc., to Compel Responses by BellSouth Telecommunications, Inc. to Their First Data Request to BellSouth* ("Joint Motion").

I. Procedural History

On August 6, 2001, the Hearing Officer issued a Notice of Filing notifying the parties that all discovery requests must be filed on or before August 21, 2001, and all responses to discovery must be filed on or before September 4, 2001. On August 21, 2001, as instructed in the notice, the following Intervenors served discovery requests upon BellSouth Telecommunications, Inc. ("BellSouth") and filed the same with this agency: Consumer

Advocate and Protection Division of the Office of the Attorney General and Reporter (“Consumer Advocate”); Sprint Communications Company, LP (“Sprint”); AT&T Communications of the South Central States, Inc. (“AT&T”); the Southeastern Competitive Carriers Association (“SECCA”); Brooks Fiber Communications of Tennessee, Inc. (“Brooks Fiber”); MCImetro Access Transmission Services, LLC (“MCImetro”); Time Warner of the Mid-South, LP (“Time Warner”); XO Tennessee, Inc. (“XO”); and Dieca d/b/a Covad Communications Company (“Covad”).¹ On August 24, 2001, BellSouth filed objections to Sprint’s requests as well as the joint requests of AT&T, SECCA, Brooks Fiber, MCImetro, Time Warner, XO, and Covad.² On August 27, 2001, BellSouth filed objections to the Consumer Advocate’s discovery requests.³

The Hearing Officer issued a Notice of Filing on August 28, 2001, instructing all Intervenors desiring to file a motion to compel to do so no later than August 31, 2001. The notice also provided that BellSouth could file responses to the motions to compel no later than September 6, 2001.

On August 29, 2001, AT&T filed a request for extension of time in which to file a motion to compel. On August 30, 2001, BellSouth filed a letter wherein BellSouth stated that it had no objection to AT&T’s request, provided BellSouth was afforded an extension until September 13, 2001, within which to file its response. On August 30, 2001, the Hearing

¹ AT&T, SECCA, Brooks Fiber, MCImetro, Time Warner, XO, and Covad filed joint discovery requests.

² See *BellSouth Telecommunications, Inc.’s Objections to Sprint’s First Set of Interrogatories and First Request for Production of Documents* (Aug. 24, 2001); *BellSouth’s Objections to AT&T Communications of the Southern States, Inc., the Southeastern Competitive Carriers Association, Brooks Fiber Communications of Tennessee, Inc., MCImetro Access Transmission Services, LLC, Time Warner of the Mid-South, LP, XO Tennessee, Inc. and Dieca d/b/a Covad Communications Company’s First Data Request to BellSouth Telecommunications, Inc.*, (Aug. 24, 2001) (hereinafter *Objections to Joint Requests*).

³ *BellSouth’s Objections to First Data Requests of Consumer Advocate and Protection Division* (Aug. 27, 2001).

Officer issued a Revised Notice granting AT&T an extension until September 6, 2001, and BellSouth an extension until September 13, 2001.

On August 31, 2001, the Consumer Advocate filed the *Consumer Advocate's Motion*, and on September 6, 2001, AT&T, SECCA, Covad, MCI WorldCom, Inc., Time Warner, and XO filed the *Joint Motion*.⁴ On September 13, 2001, BellSouth filed *BellSouth's Response to Motion to Compel of Consumer Advocate and Protection Division* ("Response to Consumer Advocate's Motion") and *BellSouth's Response to Motion to Compel of AT&T Communications of the Southern States, Inc.; the Southeastern Competitive Carriers Association; Brooks Fiber Communications of Tennessee, Inc.; MCImetro Access Transmission Services, LLC; Time Warner of the Mid-South, LP, XO Tennessee, Inc.; and Dieca d/b/a Covad Communications Company's First Data Request to BellSouth Telecommunications, Inc.* ("Response to Joint Motion").

II. Findings and Conclusions

The Hearing Officer finds that some of the discovery disputes may be resolved at this time. In other instances, the Hearing Officer finds that further argument is appropriate. The following discussion addresses each of these findings.

A. Objections

TRA Rule 1220-1-2-.11 requires that discovery in contested cases before the agency be "effectuated in accordance with the Tennessee Rules of Civil Procedure."⁵ In general, the

⁴ It is unclear from the filings why MCI WorldCom, Inc., rather than MCImetro, joined in this filing. Nevertheless, for the purposes of this Order, the Hearing Officer will treat the entities as a single party, hereinafter referred to as "MCI."

⁵ Tenn. R. & Regs. 1220-1-2-.11 (Sept. 2000, Rev.).

scope of discovery in Tennessee is broad.⁶ Rule 26.02(1) of the Tennessee Rules of Civil Procedure permits parties to obtain any information that is relevant and not privileged.⁷ There are, however, possible limitations. Specifically, Rule 26.02(1) permits limitations on the discovery of information that is unreasonably cumulative or duplicative, obtainable from another source, or unduly burdensome.⁸

Parties may choose from a variety of tools when effectuating discovery. Rule 33.01 permits parties to serve written interrogatories.⁹ Also, Rule 34.01 permits parties to serve requests to produce and permit inspection of documents.¹⁰ In both instances, a party that chooses not to respond to a request may object by stating the reasons for the objection.¹¹

The resolution of disputes regarding discovery limitations is within the discretion of the decisionmaker.¹² The decisionmaker must view disputes “in the context of the issues being tried and the posture of the case at the time the request for discovery is made.”¹³ Additionally, the decisionmaker “should decline to limit discovery if the party seeking the limitations cannot produce specific facts to support its request.”¹⁴

⁶ See *Duncan v. Duncan*, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990); *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 357 (Tenn. Ct. App. 1985).

⁷ See Tenn. Ct. Rules Ann., Tenn. R. Civ. P. 26.02(1) (Vol. 1 2001).

⁸ See *id.*

⁹ See *id.* 33.01.

¹⁰ See *id.* 34.01.

¹¹ See *id.* 33.01 (providing: “Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the **reasons** for objection shall be stated in lieu of an answer.” (emphasis added)); *Id.* 34.02 (providing: “The response shall state . . . that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the **reasons** for objection shall be stated.” (emphasis added)).

¹² See *Roberts v. Blount Mem’l Hosp.*, 963 S.W.2d 744, 747 (Tenn. Ct. App. 1997); *Duncan*, 789 S.W.2d at 560-61; *Price v. Mercury Supply, Co.*, 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984).

¹³ *Price*, 682 S.W.2d at 935.

¹⁴ *Duncan*, 789 S.W.2d at 561.

Based on these rules and the related case law, the Hearing Officer finds that the parties' filings to date permit a ruling on some of the disputes at this time. The specific requests are addressed below.

AT&T, SECCA, MCI, Covad, XO, and Time Warner Interrogatory No.

27: Identify all of the internal measures that BellSouth utilizes to monitor and manage the productivity and performance of its personnel, work centers, and other organizational units involved in pre-ordering, ordering, provisioning, maintenance & repair, or billing functions for BellSouth's retail operations, wholesale operations, or both. The work centers and other organizational units would include, but are not limited to BellSouth's: (a) local carrier service centers; (b) residential service center; (c) business service center; (c) regional central office operations; (d) regional installation and maintenance operations; (e) regional engineering and construction operations; (f) work management centers; (g) network reliability center; (h) address/facility inventory group; (I) circuit provisioning group; (j) customer wholesale interconnection services (CWINS) center; (k) billing data centers.

and

AT&T, SECCA, MCI, Covad, XO, and Time Warner Interrogatory No.

28: Identify all of the internal reports that BellSouth utilizes to communicate and analyze the data generated by the internal performance measures identified in the preceding interrogatory.

BellSouth argues that these requests are overbroad, unduly burdensome, and are not reasonably calculated to lead to the discovery of admissible evidence.¹⁵ BellSouth contends the requests are overbroad in that they request “*all* the internal measures” and a response would span “numerous organizations and thousands of employees.”¹⁶ BellSouth also contends the requested information is not relevant because “BellSouth will provide the Authority with extensive data on its performance for [competing local exchange carriers (“CLECs”)].”¹⁷ AT&T argues that the information is relevant “because a comparison of BellSouth's internal

¹⁵ See *Objections to Joint Requests*, p. 4.

¹⁶ *Response to Joint Motion*, p. 8.

¹⁷ *Id.*

productivity and performance measures with the external measures applied by various commissions and third-party tests will reflect upon the accuracy and completeness of the external measures, which are part of the Section 271 evaluation.”¹⁸

The Hearing Officer finds that the requested information is relevant to this proceeding and that BellSouth has failed to establish that the request is overbroad or unduly burdensome. Section 251(c)(2)(c) requires BellSouth to provide interconnection to CLECs at parity,¹⁹ and Section 251(c)(3) requires BellSouth to provide access to unbundled network elements to CLECs at parity when technically feasible.²⁰ Section 271(c)(2)(B)(i) and (ii) requires BellSouth to comply with Section 251(c)(2) and (c)(3) as part of the 271-approval process.²¹ Knowledge of BellSouth’s internal measurements is necessary to compare BellSouth’s retail performance to the wholesale performance of BellSouth in providing service to the CLECs. Without knowledge of BellSouth’s internal measurements, it will be difficult to determine if the CLECs are receiving service at parity with BellSouth’s retail operations and, therefore, being afforded an opportunity to compete. Therefore, the Hearing Officer overrules BellSouth’s objections and orders BellSouth to provide the requested information.

AT&T, SECCA, MCI, Covad, XO, and Time Warner Interrogatory No. 100: Provide copies of all complaints, verbal or written, filed by competing carriers concerning problems with BellSouth’s OSS including the LCSC and LENS since January 1, 2000.

BellSouth objects to producing confidential letters of CLECs. BellSouth also objects to this request as overbroad. BellSouth agrees to respond with non-CLEC confidential

¹⁸ *Joint Motion*, p. 7.

¹⁹ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 96-325, CC Docket No. 96-98, 11 FCC Rcd. 15,499, ¶ 26 (Aug. 8, 1996) (First Report and Order) (hereinafter *First Report and Order*).

²⁰ *See id.* ¶ 313.

²¹ *See* 47 U.S.C. § 271(c)(2)(B)(i) & (ii) (Supp. 2000).

communications from January 1, 2001.²² AT&T, SECCA, MCI, Covad, XO, and Time Warner state that they will amend their request to encompass all such complaints during the most recent twelve-month period and maintain that, because all parties have signed the proprietary agreement in this docket, BellSouth's confidentiality argument has no merit.²³

Complaints concerning BellSouth's Operational Support Systems are relevant to a determination of the viability of those systems and the systems' ability to adequately serve CLECs in competition with BellSouth. For these reasons, the Hearing Officer overrules BellSouth's objections to the extent that BellSouth shall provide copies of all complaints filed by CLECs that are parties to this docket for the most recent twelve-month period.

AT&T, SECCA, MCI, Covad, XO, and Time Warner Document Request No. 21: For the latest 12 month period, produce the actual performance data resulting from the internal measures identified in Interrogatory No. 19 to the extent that such data was not included in PMAP.

BellSouth argues that the request is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.²⁴ BellSouth further contends that it is unreasonable for it to respond because the "request seeks information that stretches over numerous organizations and thousands of employees."²⁵ AT&T states that reference to Interrogatory No. 19 in this request is an error and the reference should be to Interrogatory No. 27. AT&T argues that the information is relevant "because a comparison of BellSouth's internal productivity and performance measure results with the results from external measures

²² See *Objections to Joint Requests*, p. 6; *Response to Joint Motion*, p. 11.

²³ See *Joint Motion*, p. 13.

²⁴ See *Objections to Joint Requests*, p. 7.

²⁵ *Response to Joint Motion*, p. 12.

applied by various commissions and third-party tests will reflect upon the accuracy and completeness of external measures, which are a part of BellSouth's 271 evaluation."²⁶

The Hearing Officer finds that the requested information is relevant to this proceeding and that BellSouth has failed to establish that the request is overbroad or unduly burdensome. Section 251(c)(2)(c) requires BellSouth to provide interconnection to CLECs at parity,²⁷ and Section 251(c)(3) requires BellSouth to provide access to unbundled network elements to CLECs at parity when technically feasible.²⁸ Section 271(c)(2)(B)(i) and (ii) requires BellSouth to comply with Section 251(c)(2) and (c)(3) as part of the 271-approval process.²⁹ As explained under Interrogatories 27 and 28 above, it will be very difficult to determine if CLECs are receiving service at parity with BellSouth's retail operations and, therefore, being afforded an opportunity to compete absent knowledge of BellSouth's internal measurements. For these reasons, the Hearing Officer overrules BellSouth's objections and orders BellSouth to respond to the request as clarified in the *Joint Motion*.

Sprint's Interrogatory No. 8 Please identify and provide a copy of all BellSouth documents generated during the year 2000 and the current year to date that discuss CLEC access to LMU information in Tennessee.

BellSouth contends this interrogatory is overbroad and unduly burdensome. BellSouth states, however, that it will consider a narrowed request if Sprint chooses to submit such a revised request.³⁰ Sprint did not file a motion to compel a response to this interrogatory.

²⁶ *Joint Motion*, p. 10.

²⁷ *See First Report and Order*, ¶ 26.

²⁸ *See id.* ¶ 313.

²⁹ *See* 47 U.S.C. § 271(c)(2)(B)(i) & (ii) (Supp. 2000).

³⁰ *See BellSouth Telecommunications, Inc.'s Objections to Sprint's First Set of Interrogatories and First Request for Production of Documents*, p. 3.

Nevertheless, the Hearing Officer finds that BellSouth should respond to this request despite the lack of a motion to compel.³¹

The Hearing Officer finds that BellSouth has failed to establish that the request is overbroad or unduly burdensome. Nondiscriminatory access to loop make up information is crucial to the timely provisioning of many CLECs' services and CLECs' ability to compete with BellSouth. Any and all BellSouth internal communications concerning the provision of and/or access to loop make-up information for and by CLECs is vitally important to the determination of whether BellSouth has opened its local markets to competition. For these reasons, the Hearing Officer overrules BellSouth's objections and orders BellSouth to provide the requested information.

B. Remaining Objections

In each of the three BellSouth filings initially asserting objections to discovery requests, BellSouth lists nine general objections to the discovery request filings in their entirety and then lists various general objections to specific discovery requests. BellSouth fails to provide any specific reasons to support any of its objections. Illustrative of this fact is the objection BellSouth initially asserted in opposition to Request Nos. 1, 2, 3, 4, 12, 13, and 14 of the Consumer Advocate. The complete objection provides: "BellSouth objects to this Data Request on the grounds that it is not relevant to the subject matter of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence."³² No further explanation or analysis is provided.

³¹ Rule 26.02 of the Tennessee Rules of Civil Procedure permit action by the decisionmaker on the decisionmaker's initiative. *See* Tenn. R. Civ. P. 26.02(1) (Vol. 1 2001).

³² *BellSouth's Objections to First Data Requests of Consumer Advocate and Protection Division*, p. 3.

Given BellSouth's objections, the Intervenors could respond to nothing more than general, conclusory statements in preparing their motions to compel. In the *Response to Consumer Advocate's Motion and Response to Joint Motion*, BellSouth provides some additional information to explain its objections. In light of these novel assertions and without determining whether BellSouth complied with the Tennessee Rules of Civil Procedure when asserting its objections initially, it is the opinion of the Hearing Officer that the movants should be afforded an opportunity to reply to BellSouth's arguments.

C. Agreements to Respond

In its *Response to the Joint Motion*, BellSouth agrees to provide information it had previously withheld in response to certain requests.³³ In other circumstances, BellSouth agreed to respond to the request as clarified or modified in the *Joint Motion*.³⁴ The Hearing Officer finds that the information referred to by BellSouth should be provided prior to the filing of any reply by the Intervenors to the *Response to Consumer Advocate's Motion* or *Response to Joint Motion*.

D. Current Procedural Schedule

On August 10, 2001, the Hearing Officer issued the *Initial Order of Hearing Officer on July 12, 2001, Status Conference*. In this Order, the Hearing Officer scheduled the hearing on the demonstration of compliance with Section 271(c)(1)(A) for October 3-5 and 8-9, 2001.³⁵ On September 10, 2001, the Hearing Officer issued a Notice of Pre-Hearing Conference notifying the parties that a pre-hearing conference had been scheduled for

³³ See, e.g., *Response to Joint Motion*, p.10, Interrogatory No. 61 (stating: "Notwithstanding this objection, BellSouth will provide a response to this request."). BellSouth did not respond to this request in its September 5, 2001 discovery request responses filed with the Authority.

³⁴ See *id.* at 9, Interrogatory Nos. 35 and 39.

³⁵ *Initial Order of Hearing Officer on July 12, 2001, Status Conference*, pp. 13-14 (Aug. 10, 2001).

September 21, 2001 at 9:00 a.m. On September 11, 2001, the Hearing Officer issued a Notice directing Intervenors to file pre-filed direct, if any, and rebuttal testimony no later than September 19, 2001 and BellSouth to file surrebuttal testimony no later than September 25, 2001. It is readily apparent that these dates are not achievable when coupled with the on-going discovery disputes. Therefore, the Hearing Officer finds that all dates previously set in this proceeding should be continued until discovery is complete.

IT IS THEREFORE ORDERED THAT:

1) BellSouth Telecommunications, Inc. shall file with the Authority and produce to the parties the information referred to in Interrogatory Nos. 22, 27, 28, 38, 39, 58, 61, 67, 69, and 100 and Document Request No. 21 of *AT&T Communications of the Southern States, Inc. the Southeastern Competitive Carriers Association, Brooks Fiber Communications of Tennessee, Inc., MCImetro Access Transmission Services LLC, Time Warner of the Mid-South, LP, XO Tennessee, Inc. and Dieca d/b/a Covad Communications Company's First Data Request to BellSouth Telecommunications, Inc.* and referred to in Interrogatory No. 8 of *Sprint Communications Company L.P.'s First Interrogatories and Request for Production of Documents to BellSouth Telecommunications, Inc.* on or before **2:00 p.m. Tuesday, September 25, 2001.**

2) The Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter; AT&T Communications of the South Central States, Inc.; the Southeastern Competitive Carriers Association; Brooks Fiber Communications of Tennessee, Inc.; MCImetro Access Transmission Services, LLC or MCI WorldCom, Inc.; Time Warner of the Mid-South, LP; XO Tennessee, Inc.; and Dieca d/b/a Covad Communications Company

may file a reply to BellSouth Telecommunications, Inc.'s September 13, 2001 filings on or before **2:00 p.m. Tuesday, October 2, 2001.**

3) All dates previously set in this proceeding are continued pending completion of discovery.³⁶

4) Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days of the date of this Order.



Melvin J. Malone, Director
as Hearing Officer

ATTEST:



K. David Waddell, Executive Secretary

³⁶ Given this Initial Order, *BellSouth Telecommunication Inc.'s Motion to Amend Procedural Schedule*, filed September 14, 2001, is rendered moot. Still, for the record, BellSouth's interpretation of the September 10, 2001, Initial Order, that said Initial Order included Section 272 issues in Phase I of this proceeding, does not comport with the standards of reasonableness. First, the August 10, 2001, Initial Order clearly identified the Section 272 affiliate requirements as Phase II issues. See *Initial Order of Hearing Officer on July 12, 2001, Status Conference*, p. 13 (Aug. 10, 2001) ("[A] hearing on Section 271(c)(1)(A) should be set, with a hearing . . . on other Section 271 issues, including, but not limited to, Section 272 affiliate requirements and the public interest, to follow at a later time"). Next, the September 10, 2001, Initial Order provided that "the intent of the Phase I hearing is to receive and evaluate evidence on BellSouth's compliance with Section 271(c)(1)(A), and the inherent issues or sub-issues emanating therefrom, including the resulting opportunity to compete and status of competition in the local telephony market in Tennessee and the public interest[.]" *Initial Order of Hearing Officer on Petition of BellSouth Telecommunications, Inc. for Clarification and Reconsideration of Initial Order of Hearing Officer on July 12, 2001, Status Conference and Restatement of BellSouth's Position, In Re: BellSouth Telecommunications*, p. 12 (Sept. 10, 2001). In fact, Section 272 is not referenced in Section VI, Hearing Officer's Clarification of Phase I Hearing, of the September 10, 2001, Initial Order. Hence, BellSouth's reading of the September 10, 2001, Initial Order is so far removed from the plain language of the order as to not be credible.